No. 84-657 (b)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BANKERS TRUST COMPANY,

Petitioner,

—v.—

DANIEL RHOADES, HERMAN SOIFER, MILTON BRATEN, BROOKFIELD CLOTHES, INC., BROOKFIELD INDUSTRIES, INC., BENNINGTON COURT LTD., BRAXTON LTD., AURA BY LAURIE LTD., ERWIN COMMERCIAL CORP., MICHAEL B. MARKS, INC., TIMELY TEXTILES, INC., TODD EQUIPMENT LEASING CO., INC., CAPITAL AID CORPORATION and "JOHN DOES NOS. 1-50",

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

Petitioner, Bankers Trust Company ("Bankers"), respectfully submits this reply to the opposition briefs of respondents Herman Soifer (the "Soifer Brief") and Daniel Rhoades, et al. (the "Rhoades Brief").

Respondents argue that (i) the decision below was correct and not worthy of review and (ii) that the district court had no jurisdiction over this case. Respondents also argue non-jurisdictional issues that were not considered below and are not

raised in the petition for certiorari.[1] Such issues need not and should not be considered here. *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18 (1982) ("Because this question was neither raised in the petition for certiorari nor reached by the Court of Appeals, we do not consider it."); *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976) (". . . only in the most exceptional cases will we consider issues not raised in the petition.").

I.

THIS CASE SATISFIES THE MOST IMPORTANT CRITERIA FOR SUPREME COURT REVIEW

Respondents acknowledge, expressly or by implication, that this case satisfies the most important criteria for granting a petition for certiorari (Supreme Court Rule 17):

First, the issue here involves an important question of federal law which has not been, but should be, settled by this Court. Supreme Court Rule 17.1(c). The decision below practically eliminates an express private civil remedy enacted by Congress. *See, Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1967) (certiorari granted because the rulings of the Court of Appeals "seemed to threaten the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States.")

Second, the decision below directly conflicts with that of the Seventh Circuit in *Haroco, Inc. v. American National Bank & Trust Company*, No. 83-2529 (7th Cir. Oct. 19, 1984). Supreme Court Rule 17.1(a). Since *Haroco* expressly repudiated the Second Circuit's decision in this case, respondents are reduced to arguing that the decision below does not also conflict with decisions of other circuits. Soifer Brief, p. 16. Respondents,

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1 The non-jurisdictional issues raised by respondents include the state law statute of limitations and the characterization of this case as a "contract" claim rather than a claim under RICO. Soifer Brief, pp. 22-27.

however, misread the decisions of the Fifth and Eighth Circuits, which do conflict with the decision below, as the Seventh Circuit concluded in *Haroco*, slip op. at 27-28. Moreover, other court of appeals cases cited by Soifer (Soifer Brief, pp. 13-16), while not expressly discussing the injury issue, strongly suggest that they too would disagree with the decision below.

In *Seville Industrial Machinery Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146 (D.N.J. 1983), *rev'd on other grounds*, No. 83-5575 (3d Cir. Sept. 6, 1984) (Soifer Brief, pp. 13-14n.), the district court rejected defendants' argument that a RICO claim required "an injury different from the harm which results to a plaintiff from violations of the underlying predicate offenses." 567 F. Supp. at 1157. The district court characterized such a requirement as "artificial and unwarranted by the language of the RICO statute", citing commentators who noted that such a requirement "could lead to the anomalous result of denying standing to persons concededly the direct victims of racketeering injury." *Id.* Further, the court stated that "most courts which have sustained civil RICO complaints have accorded standing to the direct victims of the predicate acts without any need for the additional element of a 'racketeering enterprise injury.' " *Id.* Nevertheless, the district court dismissed the RICO claim on other grounds (failure to plead an "enterprise" and lack of particularity). The Third Circuit's reversal should be deemed an approval of the district court's ruling on the injury issue.

Similarly, *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984) suggests that the Fourth Circuit would also sustain Bankers' complaint. The injury alleged there, the paying of money to defendants, was a direct result of the alleged predicate acts (extortion and attempted extortion to extract more money from plaintiff than the parties' contract provided). The Fourth Circuit found that the complaint stated a claim for relief—a holding contrary to that of the decision below.

Finally, the acknowledged conflict between the Seventh and Second Circuit is deeper than a mere disagreement between panels of two circuits. The Second Circuit's three decisions below were filed, after the circuit judges denied *en banc* consideration, by agreement of the entire court. *Haroco* reveals that no judge of the Seventh Circuit favored a rehearing *en banc*, notwithstanding the recognized conflict with the Second Circuit. The result is, in effect, irreconcilable *en banc* decisions of two circuits.

The Soifer Brief (p. 22) argues that review is inappropriate because there is "the distinct possibility that Congress might soon act to amend the statute," but cites only cases where the statute had *already* been changed. In fact, contrary to Soifer's argument, even where there has been legislative action affecting a case prior to this Court's review, review has been granted where appropriate. *See, New York City Transit Authority v. Beazer*, 440 U.S. 568, 579-80 (1979); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537-38 (1978).

Moreover, there is hardly a "likelihood" that RICO will be amended. Soifer's argument is based on Senator Thurmond's recommendation that hearings be held on RICO. Senator Thurmond's full remarks (as opposed to Soifer's excerpts) focused on the "uncertainties" in the interpretation of civil RICO caused by the conflicts among the lower federal courts (specifically referring to the *Sedima* decison):

> "As a result of the varying judicial interpretations of RICO, numerous questions now exist with respect to legislation which was designed to be a vital addition to our arsenal of weapons against organized crime. *These questions and uncertainties have undermined the effectiveness of this weapon* and must be resolved" (emphasis added).

130 Cong. Rec. 13,350. Similarly, Senator DeConcini, referring to the call for hearings, said that "These hearings will provide the forum *to determine whether* or not the civil RICO language

needs to be modified, clarified *or left unchanged*." (emphasis added) The most that can be said is that RICO may at some time be amended, which is true of every statute this Court construes. *Id.*

II.

THE DISTRICT COURT HAD, AND THIS COURT HAS JURISDICTION OVER THIS CASE

Respondents contend that certiorari should be denied on jurisdictional grounds, arguing that Bankers' claim belongs exclusively to the bankrupt Braten Apparel Corporation ("BAC") or its representative. According to respondents (i) Bankers lacks standing and (ii) the Bankruptcy Court has exclusive jurisdiction of this claim. Soifer Brief, p. 24; Rhoades Brief, pp. 4-6, 8.

Respondents' standing argument is specious. Their argument in effect, is that their wholly-owned corporate tool is the *only* plaintiff who may sue them under RICO. This would render meaningless the statutory language giving a claim to "any" person, such as Bankers, injured in his business or property.[2] 18 U.S.C. §§ 1962(c), 1964(c).

Respondents' argument that the Bankruptcy Court has exclusive jurisdiction is also without merit—Bankers' claim is directly against the defendants who are not in bankruptcy, and RICO expressly places jurisdiction in the district court. 18 U.S.C. § 1964(c). That respondents' conduct has made Bankers unable to collect its debt from an insolvent BAC does not strip the district court of jurisdiction. To the contrary, Congress' concern with injuries of this nature was one reason it enacted RICO. *See*, Criminal Laws and Procedures, Hearings on S. 2187, 2188, 2189, 2190 and 2578 before the Subcomm. on the Judiciary, 89th Cong., 2d Sess. 204 (1966):

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2 Respondents' argument also ignores the injuries done to Bankers that clearly did not also damage BAC, such as Bankers' legal expenses in South Carolina and elsewhere.

> " . . . [D]eliberate bankruptcy is an alarming new nationwide phenomenon. Crime syndicates install ostensibly honest front men in business to order merchandise on credit, then loot and legally bankrupt the firm . . . But since these manipulations are almost impossible to prove, creditors are left holding the bag . . . .
>
> ". . . It is estimated that lone operators, copying Mafia techniques, bankrupt at least a thousand smaller businesses each year."

That bankruptcy frauds were made predicate offenses under RICO refutes any suggestion that injuries from such frauds were intended to be outside the scope of civil RICO actions. *See* 18 U.S.C. § 1961(1)(D). *See also*, *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648 (7th Cir. 1984) (upholding RICO claim of creditors of bankrupt company against persons who caused the bankruptcy).

Even in non-RICO cases, a creditor may sue a bankrupt's officers and directors in district court for fraud involving a contract between the creditor and the bankrupt. *See e.g.*, *Teledyne Industries, Inc. v. Eon Corporation*, 401 F. Supp. 729 (S.D.N.Y. 1975), *aff'd*, 546 F.2d 495 (2d Cir. 1976). *See also*, *Callaway v. Benton*, 336 U.S. 132, 142 (1949); *Bizzell v. Hemingway*, 548 F.2d 505 (4th Cir. 1977); *In Re Beck Industries, Inc.*, 479 F.2d 410 (2d Cir.), *cert. denied*, 414 U.S. 858 (1973).

Bankers is not precluded from suing under RICO by the fact that other BAC creditors have also suffered from respondents' conduct. If BAC's other creditors see fit to bring RICO suits against the defendants, as the Rhoades Brief (p. 6) suggests, RICO permits them to do so. *Cf. Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied sub nom. Presidential Insurance Co. v. Bennett*, 104 S.Ct. 527 (1983), in which the RICO claim was brought as a class action.

There is no little irony in respondents' argument that Bankers should be restricted to the remedies available in Bankruptcy Court. Respondents perverted the bankruptcy law and its processes during the period 1974 though 1976 and did so again in early 1982, as their earlier frauds were about to be undone. Thus, their mockery of the bankruptcy law and the Bankruptcy Court has brought Bankers here, and it was for such criminal conduct that the remedies of RICO were intended.

Because Bankers has a direct claim under RICO against the respondents, Bankers has standing to sue, and the related argument that the Bankruptcy Court has exclusive jurisdiction must be rejected.[3]

CONCLUSION

For the foregoing reasons, respondents' arguments in opposition to Bankers' petition for a writ of certiorari should be rejected and the writ should issue.

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December 3, 1984

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3 The Rhoades Brief's argument (p. 8) that the case is moot appears to rest exclusively on Bankers' purported lack of standing, and therefore is also without merit for the reasons given above.